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1 [The R.M.C. 803 session was called to order at 1605,
2 18 February 2016.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present that were present when the
5 commission recessed and all five detainees are also here. All
6 four detainees are here. Mr. Bin'Attash remains absent.
7 Thank you.

8 Mr. Connell, just so we can get the same universe
9 here, I have now had a chance to review those attachments.

10 LDC [MR. CONNELL]: Yes, sir.

11 MJ [COL POHL]: And just so I am clear what your universe
12 is, and then I will go to Mr. Groharing, it is these e-mail
13 attachments that are redacted out, and some of the redactions
14 appear to be PII, there may be other things ----

15 LDC [MR. CONNELL]: Sure.

16 MJ [COL POHL]: ---- but those are the ones you want the
17 unredacted copies for?

18 LDC [MR. CONNELL]: Yes, sir. There are three things --
19 three universes, three elements of the universe that I know
20 about, though, you know, surely what I know about doesn't
21 necessarily define the prosecution's responsibility. But the
22 things that I know about are the redacted e-mails, which are
23 in AE 195, Attachment B, it is the redacted IG report -- there

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1 are two redacted IG reports in AE 195 (AAA) Supp. One of them
2 is about the director of the CIA; I don't see that as
3 responsive. That was where he made a classified statement to
4 an unclassified person, Mr. Boal, in a classified setting. I
5 don't really see that as the crux of the issue, but the second
6 Inspector General report is extremely important because it
7 contains the written statements of CIA Officer A and B and
8 several others.

9 So the redacted version ----

10 MJ [COL POHL]: Do you want the report or the statements?

11 LDC [MR. CONNELL]: I'm sorry, sir?

12 MJ [COL POHL]: Do you want the report or the statements?

13 LDC [MR. CONNELL]: Well, the statements are the most
14 important. I don't know if the -- and the statements are
15 exhibits to the report itself. It seems like the report does
16 describe communications, because there are places in which the
17 report disagrees with the statements of people make in the
18 exhibits or compares the two and says, you know, that someone
19 is not being completely forthcoming or whatever, but ----

20 MJ [COL POHL]: Unredacted e-mails, most of the
21 redactions -- again, I am looking at them quickly here -- deal
22 with to and from lines, but the substance of most of them
23 appear to be there, would that be accurate?

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1 LDC [MR. CONNELL]: Yes, I think that's accurate, largely
2 accurate.

3 MJ [COL POHL]: So you have the communications, what was
4 communicated.

5 LDC [MR. CONNELL]: We don't know who is communicating.
6 To and from lines are out. The ----

7 MJ [COL POHL]: How does this -- let me go to what I
8 consider the bigger issue, then, than this.

9 LDC [MR. CONNELL]: Sure.

10 MJ [COL POHL]: Would it be fair to say that the purpose
11 of this discovery request is to verify the treatment of your
12 client?

13 LDC [MR. CONNELL]: That is a purpose and a key purpose.
14 There are other smaller, subsidiary purposes, but yes.

15 MJ [COL POHL]: Okay. So if the CIA -- let me go -- let's
16 take the easy one. Let's take the mat thing, for example, and
17 I am not going to characterize that as whatever technique or
18 whatever it is. Okay.

19 LDC [MR. CONNELL]: Sure.

20 MJ [COL POHL]: The CIA, when you get the RDI discovery,
21 it's in there, do you need to have it confirmed by the
22 moviemakers?

23 LDC [MR. CONNELL]: Well, it's not confirmed. It's not

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1 confirmed by the moviemakers. I am really not that interested
2 in the moviemakers as witnesses, I am interested in --
3 although they might be -- but CIA Officer A and B is who is I
4 am interested in and their less-guarded descriptions of their
5 interactions with the person I believe to be Mr. al Baluchi
6 are really important. Because you know, there is an enormous
7 difference between a cable, which is sanitized, then
8 summarized, then, you know, passed up to lawyers and everybody
9 else, and the on-the-ground description of what's actually
10 happening, and I believe that that's what CIA Officer A and
11 CIA Officer B were providing.

12 In the excerpts I provided from CIA Officer B, the
13 sentence is heavily redacted, but it is to the effect that the
14 filmmakers really wanted to know what it actually felt like in
15 the room and, you know, that's what's important, what did it
16 actually feel like in the room.

17 MJ [COL POHL]: But would that not be a motion for
18 discovery for that individual, not -- I'm just trying to get
19 the bridge here between this e-mail traffic between the agency
20 and -- the CIA and moviemakers with what you are really
21 looking for.

22 LDC [MR. CONNELL]: Okay.

23 MJ [COL POHL]: Are you looking for on the ground, what --

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1 you said you don't want the moviemakers, but it seems to me
2 you do.

3 LDC [MR. CONNELL]: Right.

4 MJ [COL POHL]: No, I mean, I'm not trying to expand your
5 request for you. But I am just simply saying you just told me
6 you want to know what the operatives said in their unguarded
7 interaction with the moviemakers ----

8 LDC [MR. CONNELL]: Sure.

9 MJ [COL POHL]: ---- and at this point in time I am not
10 sure what version you will get from them, but whatever version
11 you get, you want to say -- you want to talk to who they
12 talked to?

13 LDC [MR. CONNELL]: Sure, of course. Yes, that's right.

14 MJ [COL POHL]: Okay. But that's not this motion. This
15 motion is you just want the unredacted e-mails and the
16 unredacted report?

17 LDC [MR. CONNELL]: No, that's not true either. What I
18 wanted was what I asked for, which is communication,
19 information about communications between U.S. Government
20 personnel, which is largely DoD and CIA in this situation --
21 it could be somebody else, I don't know -- and the Hollywood
22 filmmakers, and the reason why is because that's what I have a
23 window into. I know that these communications exist, I know

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1 that there are memoranda describing them, memoranda for record
2 describing them. I know that there are e-mails which are --
3 which both are themselves communication and describe further
4 communication. Give me just a moment.

5 [Pause.]

6 LDC [MR. CONNELL]: So, for example, in a July 20, 2011
7 e-mail from Mr. Boal to then-CIA director of public affairs,
8 Mr. Little ----

9 MJ [COL POHL]: Is this in your attachment?

10 LDC [MR. CONNELL]: Yes, though I will have to look up
11 what the record number cite is.

12 MJ [COL POHL]: You don't have the page number at the
13 bottom of it?

14 LDC [MR. CONNELL]: I have not -- I am looking at a
15 different -- I am looking at a summary document, not all 362
16 pages.

17 MJ [COL POHL]: Go ahead.

18 LDC [MR. CONNELL]: For example, Mr. Boal thanks
19 Mr. Little for "Pulling for him with the agency" and said it
20 made all the difference and Mr. Little responds, "I can't tell
21 you how excited we are at the DoD and CIA about the project.
22 P.S., I want you to know how good I've been about not
23 mentioning the premier tickets."

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1 Now, there is other situations where in an internal
2 CIA memo, the CIA spokesperson, Ms. Harf, H-a-r-f, describes
3 Boal's contact with the agency as a "deep dive." The reason
4 why I am telling you this is that the e-mails are both
5 themselves communication and are evidence of other further
6 communications that, you know, we want to investigate.

7 MJ [COL POHL]: Okay. So just so I am clear, you want
8 these unredacted e-mails and ----

9 LDC [MR. CONNELL]: The IG report regarding -- I think
10 it's the IG report and the unredacted CIA memo regarding the
11 meetings between the Office of Public Affairs and the
12 filmmakers.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: Which is Attachment D. The redacted
15 version is Attachment D to AE 195.

16 MJ [COL POHL]: Just so I am clear because I am going to
17 ask Mr. Groharing this so we understand our universe. You
18 want unredacted copies of the documents attached, unredacted
19 version of the memorandum, a copy of which is attached, and
20 the IG report of which at least the cover page is attached?

21 LDC [MR. CONNELL]: Yes, that's right. But I do want to
22 be clear, because this takes us back to our, you know,
23 description earlier of the ask and the e-mails. The ask is for

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1 information about communications between U.S. personnel and
2 Hollywood filmmakers. There are three -- and, you know, to
3 use the language earlier, including but not limited to the
4 DoD -- the e-mails which we know about, the memo which we know
5 about, and the IG report which we know about. But there could
6 be something else, and I don't -- only the government knows
7 that because only they have access. So yes, I do want those
8 three pieces of information, but I want everything which was
9 responsive to the discovery request now that I have
10 articulated fairly clearly, I think, its materiality.

11 MJ [COL POHL]: Okay. Thank you.

12 LDC [MR. NEVIN]: Your Honor, could I be heard on behalf
13 of Mr. Mohammad?

14 MJ [COL POHL]: Sure.

15 LDC [MR. NEVIN]: Just to follow on with what Mr. Connell
16 just said, I thought that I understood Mr. Groharing to be
17 saying that the totality of what the government reviewed was
18 material that had been produced or developed in the FOIA
19 litigation. I understand that the discovery request is
20 broader than that, and I think that's the point that
21 Mr. Connell was just speaking to, and I join that. And maybe
22 I heard Mr. Groharing incorrectly, but if what -- if my
23 understanding of what he said is correct, it seems to me the

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1 government has the authority, the obligation to make a wider
2 search.

3 Second, I thought that I heard Mr. Groharing say that
4 these are -- these are e-mails from one person to another
5 person, part of it is redacted, but the part that's redacted
6 is not a communication. And maybe I heard that wrong also,
7 but I don't see how the contents of an e-mail from one person
8 to another cannot be communication. The purpose of an e-mail
9 is communication.

10 MJ [COL POHL]: Well, the body, necessarily, but, for
11 example, you know, the redaction of a particular name, he may
12 be referring to that. Because that's what a lot of these
13 redactions are. If you look at the exhibit, again, that's 517
14 pages long -- thank you, Mr. Connell ----

15 LDC [MR. CONNELL]: Anytime, sir.

16 MJ [COL POHL]: I know. But a lot of the redactions are,
17 you know, personal information of the to/from lines, not the
18 body of the communication. But I'll ask Mr. Groharing himself
19 if that's what he meant.

20 LDC [MR. NEVIN]: Thank you, Your Honor, and I would just
21 say those -- these -- this is redacted information about
22 witnesses from the government's standpoint. This is
23 information about witnesses from our standpoint that's

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1 important to us in order to be able to do follow-up
2 investigation.

3 MJ [COL POHL]: Okay.

4 LDC [MR. NEVIN]: And finally, with respect to the
5 purpose, our view on behalf of Mr. Mohammad is that this is a
6 much broader issue than simply identifying the details of what
7 was done to Mr. al Baluchi, as important as that is, because
8 this bears on the issue we have talked about of the government
9 and its moral authority to execute, because we are dealing
10 here with the government making -- essentially selling a view
11 of the RDI program.

12 This is at a time, at least for part of it, when
13 presumptive classification was still in effect with respect to
14 us, so you have these filmmakers being provided with a great
15 deal more information than the lawyers defending the case were
16 being provided with, and to this day have still been provided
17 with. And yet you have a film which is being offered to the
18 world, and including our future jury pool, and including
19 persons in the political class as well who are enacting laws
20 and making decisions about what to do with pending litigation
21 and all the rest, and it is a serious matter that goes beyond
22 just the raw contents of it. The implications of the
23 government taking these actions are extremely important as

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1 well. Thank you.

2 LDC [MR. RUIZ]: Your Honor.

3 MJ [COL POHL]: Sure, Mr. Ruiz.

4 LDC [MR. RUIZ]: I just want to be perfectly clear on a
5 point. I think Mr. Nevin made it, but I want to be sure that
6 it is clear for purposes of Mr. al Hawsawi, which is are you
7 looking at the discovery of this information as one that's
8 discoverable to one or to all? And if there is any opposition
9 from the government in terms of providing this information,
10 should it be ordered discoverable to Mr. al Baluchi, to
11 Mr. al Hawsawi, then I would like an opportunity to be heard
12 on those issues.

13 MJ [COL POHL]: Well, if we get down to that. I mean, we
14 had this discussion earlier about some of these categories
15 about what's going to be just to some and not necessarily to
16 all. I think the default is, as it has been all along, it
17 goes to all unless there is a reason it goes to only some.
18 For example, medical records should just go to the individual
19 first and then go from there. I use that as an example.

20 But if there is some limitations on it that they are
21 saying we are only going to give it to Mr. al Baluchi, first
22 of all, Mr. Connell will know that and then just raise it to
23 me and we will see if there is a good reason for it. But the

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1 default, I am assuming the default is it goes to everybody.

2 LDC [MR. RUIZ]: I just raise it now because we are on the
3 issue now.

4 MJ [COL POHL]: I got you.

5 LDC [MR. RUIZ]: Presumably the government has had an
6 opportunity to review the materials and could voice an
7 objection now as opposed to later.

8 MJ [COL POHL]: Well, what I am saying is the default, it
9 goes to everybody. If there is reason it doesn't go to
10 everybody -- first of all, if it doesn't go to everybody, one
11 of you five will know that and then ----

12 LDC [MR. RUIZ]: Right, all I am saying is it is
13 incredibly inefficient if we are going to wait to make that
14 argument later. If they have that opposition now, we could
15 deal with it now.

16 MJ [COL POHL]: If they have an opposition on -- a
17 limitation to discovery as we are discussing it, it's their
18 responsibility to raise it.

19 LDC [MR. RUIZ]: Okay. Thank you.

20 MJ [COL POHL]: Ms. Bormann.

21 LDC [MS. BORMANN]: I want to follow up with what Mr. Ruiz
22 said and Mr. Nevin. We have been operating on behalf of
23 Mr. Bin'Attash under the court's rules, which state that when

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1 one of the accused files a motion, we automatically join it
2 unless we unjoin it.

3 So when a co-accused files a motion to compel, we
4 have been under the presumption that we have joined that. So
5 that is our position, and if the court is going to treat it
6 differently than that, then ----

7 MJ [COL POHL]: I don't think I am. I think I just said
8 that.

9 LDC [MS. BORMANN]: Just making it clear. Making it
10 clear.

11 MJ [COL POHL]: Okay.

12 LDC [MS. BORMANN]: The next thing that I wanted to say is
13 that the interview of Officers A and B, as they are referred
14 to, is something that is -- first of all, let's talk about
15 what discovery requires, right? I don't know if it is
16 classified or not because none of us have seen it, but if
17 there was a conversation that occurred between Mr. Boal and
18 two CIA officers at some point, presumably, unless they
19 violated national security protocol, national security law, it
20 wasn't classified, right? So that's not classified, and if it
21 is not classified, the cumulative argument doesn't lie.

22 You suggested earlier, when Mr. Connell was up here,
23 that, well, if you are going to get it as part of the RDI

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1 discovery and you are going to find out what happened to your
2 client in that location at that time, do you really need the
3 description later, and Mr. Connell rightly argued that it's
4 different; it's a different type of description. And this is
5 one of those situations that I mentioned earlier. This
6 wouldn't be cumulative, because how we describe subsequent
7 events after we've had a time to reflect and in different
8 circumstances often differs even in subtleties from the
9 original description that we make, and those subtleties are
10 often the basis for impeachment, and impeachment is never
11 collateral. That's why you, Judge, should be the determiner
12 of what is cumulative and what isn't.

13 MJ [COL POHL]: Mr. Harrington.

14 LDC [MR. HARRINGTON]: Judge, I think this is an example
15 of what we were talking about earlier with respect to Brady,
16 and perhaps the government didn't look at this itself because
17 it's a situation that maybe wouldn't have drawn their
18 attention but now their attention is there, and it seems to me
19 that given the global nature of this that the other counsel
20 have described, this clearly enters a Brady situation and the
21 government should take a real hard look about this, at what is
22 favorable information to us, not just the information itself,
23 what logically it could lead to that was just described by

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1 Mr. Nevin and Ms. Bormann. Thank you.

2 MJ [COL POHL]: Thank you.

3 Mr. Groharing. There are three identified bits of
4 information by Mr. Connell. The first are those redacted
5 e-mails.

6 TC [MR. GROHARING]: Correct.

7 MJ [COL POHL]: Okay. Now -- and, again, I may have
8 misunderstood -- those are the e-mails he wants in an
9 unredacted form. I am not saying you have got to give it to
10 him, but -- so you agree that's what we are talking about?

11 TC [MR. GROHARING]: Yes, sir.

12 MJ [COL POHL]: Okay. Now, the government position is he
13 doesn't get the unredacted e-mails, because?

14 TC [MR. GROHARING]: Because none of the redactions in
15 those e-mails were communications to and from CIA officers,
16 CIA personnel.

17 MJ [COL POHL]: And the redactions were what? I mean, do
18 they speak for themselves, basically?

19 TC [MR. GROHARING]: They were names. I think to speak to
20 a point that Mr. Nevin made, a lot of the communications were
21 between CIA officers. So it was about the filmmakers, but it
22 was a discussion back and forth between CIA officers about the
23 filmmakers, about things that Mr. Boal was doing in the movie

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1 and implications that could have for the CIA, and that -- and
2 those discussions talked about classified information, about
3 information that he might -- the way he might portray
4 something and then what implication that might have. It
5 didn't have anything to do with what anybody said to him.

6 MJ [COL POHL]: Okay. So I'm a little clearer on your --
7 so let me see. You have got -- and, again, I've got them
8 sitting in front of me, but they are voluminous, to say the
9 least. You have got some redactions of what I call PII and
10 some CC people, but any redactions that goes from CIA to CIA
11 on this topic you consider nonresponsive because he's asking
12 for it between the CIA and the filmmakers?

13 TC [MR. GROHARING]: And they weren't about communications
14 between the CIA and the filmmakers either.

15 MJ [COL POHL]: Okay. I got you. Okay. Then a lot of
16 those are classified?

17 TC [MR. GROHARING]: Correct.

18 MJ [COL POHL]: Okay. Okay. So there is no classified
19 information going from the CIA to the filmmakers in this ----

20 TC [MR. GROHARING]: No.

21 MJ [COL POHL]: Okay. Okay. So that's the redactions on
22 the e-mail?

23 TC [MR. GROHARING]: Correct.

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1 MJ [COL POHL]: The second category was the IG report.

2 TC [MR. GROHARING]: There was a Panetta ----

3 MJ [COL POHL]: I don't believe -- is it the Panetta
4 review or the -- I believe it was the other one.

5 TC [MR. GROHARING]: Other ----

6 LDC [MR. CONNELL]: Ethics one.

7 TC [MR. GROHARING]: It was focusing on the second one
8 with the written statements from the CIA officers.

9 MJ [COL POHL]: Are there written statements from the
10 agency officers -- because again, I want to make sure we don't
11 overly parse things.

12 TC [MR. GROHARING]: Correct.

13 MJ [COL POHL]: And I understand you need specificity from
14 the defense, but on the other hand, there is some type of
15 implied task in these things. So he asks for communications
16 between the CIA and the filmmakers. They apparently had an IG
17 investigation into how this was handled in some ways?

18 TC [MR. GROHARING]: Well, the allegations were of
19 improper receipt of gifts and things of that nature, not
20 improper communications between them.

21 MJ [COL POHL]: Okay. But it was -- okay. Okay. The
22 Hollywood people were being generous with the CIA people that
23 they perhaps should not have been. I am not going to get into

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1 that.

2 But in that report, you have statements by CIA
3 agents. Are there, in those statements by the CIA agents,
4 things they said they told the Hollywood people?

5 TC [MR. GROHARING]: Those portions of the statements are
6 not redacted.

7 MJ [COL POHL]: Okay.

8 TC [MR. GROHARING]: So if there is a discussion of what
9 they said to the Hollywood people or vice versa, that would be
10 the unredacted portion of the e-mails.

11 MJ [COL POHL]: They have that. Again, the parsing
12 things, because that's a secondhand recollection of we told
13 the Hollywood people X and that's in the investigation, you
14 have already provided that, and anything redacted does not
15 deal with the communications between the CIA ----

16 TC [MR. GROHARING]: Correct.

17 MJ [COL POHL]: ---- and the Hollywood people, the term I
18 am using?

19 TC [MR. GROHARING]: Yes.

20 MJ [COL POHL]: Number three. This memo, what's the story
21 with that?

22 TC [MR. GROHARING]: I think that's Attachment D to
23 Mr. Connell's filing, if I am correct. Yes, sir.

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1 MJ [COL POHL]: Are the redactions in that memo?

2 TC [MR. GROHARING]: That's much the same. There are very
3 limited redactions in the memo, and those redactions go to the
4 same points I was talking about earlier, things that would be
5 portrayed in the movie and potential impact on the CIA. Also,
6 there is a line that says -- that were very similar to the
7 names of the real-life officers. The lines after that talk
8 about the real people. So this is an internal CIA report.

9 MJ [COL POHL]: When you say "the real people," who were
10 involved in the interface with the movie people?

11 TC [MR. GROHARING]: Correct.

12 MJ [COL POHL]: Okay. And so that is a ----

13 TC [MR. GROHARING]: Classified information about that.

14 MJ [COL POHL]: Okay. Because they are ----

15 TC [MR. GROHARING]: They don't talk about what they said
16 to the filmmakers, it just talks about them.

17 MJ [COL POHL]: So it's the government's position that any
18 redaction of any three of these things are nonresponsive to
19 the request because none of them deal with communications
20 between the CIA and the Zero Dark Thirty filmmakers?

21 TC [MR. GROHARING]: Correct.

22 MJ [COL POHL]: Now, the issue about the names of the
23 people, that's ----

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1 TC [MR. GROHARING]: I think that goes to our Category D
2 in the 120 construct that we talked about a little bit
3 already.

4 MJ [COL POHL]: Okay. I understand.

5 TC [MR. GROHARING]: I do note that the defense in that
6 construct, people that are labeled as direct and substantial,
7 we are proposing an opportunity for them to make a request to
8 speak to them. So under these circumstances, assuming you are
9 talking about personnel that would have been directly involved
10 with performing enhanced interrogation techniques on the
11 accused, that would be the type of person that would fit in
12 that category and the defense would then have that avenue to
13 make a request to speak to them under that construct ---

14 MJ [COL POHL]: Okay.

15 TC [MR. GROHARING]: ---- about those, the circumstances
16 of that interrogation.

17 MJ [COL POHL]: Okay. Okay. I think I understand 195
18 now. Thank you.

19 Sure.

20 LDC [MR. CONNELL]: I never take your questions to mean
21 anything, because I know that sometimes you are asking because
22 you are looking for confirmation and sometimes you are looking
23 because you believe the opposite, you are asking because you

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1 believe the opposite of something else, so I am not trying to
2 read more into the exchange that I just heard than it
3 deserves.

4 But the government is parsing the responsive
5 information unbelievably close, and the -- when you look at,
6 say, Attachment D to 195, you see that there is -- I mean,
7 there is sentences that are discussing -- even the sentence
8 that refers to Ammar al Baluchi has a redaction in it. It's
9 not possible to say that these are not responsive to the
10 discovery requests when they're asking about and it's not
11 possible to say that they are not Brady material, that they
12 are not favorable to the defense when they are talking about
13 what happened to Mr. al Baluchi, whether there really was a
14 dousing event or those kinds of things. And so the
15 government's X-Acto knife descriptions that it is proposing
16 here in oral argument today, never heard from before, of why
17 it thinks that what's underneath these redactions is not
18 favorable I think is not ----

19 MJ [COL POHL]: No, they didn't say not favorable. What I
20 heard them say was, you asked for communications between the
21 CIA and the moviemakers.

22 LDC [MR. CONNELL]: U.S. Government persons.

23 MJ [COL POHL]: Okay. U.S. Government persons, okay, and

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1 the moviemakers.

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: And what they are saying is no redacted
4 material deals with those type of communications.

5 LDC [MR. CONNELL]: That's not what they are saying. What
6 they are actually saying ----

7 MJ [COL POHL]: Wait a minute, stop --

8 LDC [MR. CONNELL]: ---- are actually communications.

9 MJ [COL POHL]: Mr. Connell, stop.

10 Is that what you are saying, Mr. Groharing?

11 TC [MR. GROHARING]: Yes, sir.

12 LDC [MR. CONNELL]: Deal with communications?

13 Attachment D is a memorandum describing communications between
14 the Office of Public Affairs and the filmmakers. To say that
15 it doesn't deal with those communications blinks reality. It
16 certainly deals with communications.

17 Now, if their parsing is between actual direct
18 communication between filmmakers and CIA versus a description
19 of communications between filmmakers and CIA or DoD, that is
20 too fine a line, is the point I wanted to leave you with,
21 because the topic area is the communications. And if it is
22 really just I need to insert two more words into the discovery
23 request and send it to them again, then why don't we just go

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1 ahead and deal with it now, because it's material and
2 favorable to the defense either way. It falls under the
3 government's production responsibilities, even if they have
4 found a way to read the actual request to exclude what is
5 plainly discoverable.

6 MJ [COL POHL]: Okay. Okay.

7 LDC [MR. CONNELL]: Thank you, sir.

8 MJ [COL POHL]: Last word, Mr. Groharing.

9 TC [MR. GROHARING]: Thank you. I just want to make
10 clear, Judge, we're not parsing it close in this instance.
11 The request was for any communications. We clearly looked for
12 that information; this is not that information.

13 To the extent that there is information in here, if
14 there were information in here and we saw it, and even
15 assuming that the request from Mr. Connell was only to look
16 for information about communications, if there was information
17 about the treatment of Mr. Ali or any of the other accused, or
18 information that's discoverable for some other reason, we
19 would most certainly identify it and put that information,
20 even if classified, through the process of discovery.

21 So I don't want the Court or anyone else to be left
22 under the impression that we're requiring the defense to say
23 magic words in order to find specific information and to

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1 provide that information.

2 To the extent that any of the information behind the
3 redactions here is regarding the treatment of Mr. Ali, if that
4 information were not otherwise available in other sources, we
5 would most certainly provide that information to the defense.

6 MJ [COL POHL]: Thank you. 252. Now, reading the
7 government's response, I am looking at their chart -- it is
8 just easier than looking at the whole thing -- this seems to
9 be a pending -- I hate using that term -- pending a review
10 before they can give you a response. Is that how you read it?
11 I mean, it says "the prosecutor is currently reviewing the IG
12 memo referenced in the defense requests. Upon completion of
13 the review, the prosecution will provide any that are," here
14 is is your favorite word, "noncumulative, relevant and
15 helpful."

16 LDC [MR. CONNELL]: Sir, what I believe the actual
17 situation is and what I pled in 397A is I believe that 252 is
18 a subset of 112. All right. If the military commission were
19 to entertain favorably our motion to compel in AE 112, it
20 would include the information which is responsive to 252.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: The difference between 112 and 252 is
23 that in discovery the prosecution produced six memoranda that

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1 had the same -- the public versions that you could download,
2 you know, from the President's website of OLC memoranda. And
3 the 252 is an explanation of why those -- you know, the public
4 FOIA redactions are not equivalent to criminal defense
5 redactions. But those documents are all encompassed within
6 112, so if you rule on 112, you don't have to rule on 252. If
7 you were to deny 112 outright, then I think you would have to
8 rule on 252, but the reasons are very much the same.

9 MJ [COL POHL]: Okay. Thank you.

10 LDC [MR. CONNELL]: So our position, to be 100 percent
11 clear, is you should grant relief in 112 and that would moot
12 252.

13 MJ [COL POHL]: Okay. I'm going to skip over here -- and
14 I am not minimizing the next one in line, it is Mr. Hawsawi's.
15 But I am looking at the clock and I want to just kind of
16 address some things, but we will certainly come back, I am not
17 minimizing other things, but let me ask you about 286.

18 LDC [MR. CONNELL]: All right.

19 MJ [COL POHL]: All unredacted versions of the Senate
20 report.

21 LDC [MR. CONNELL]: So 286 is going to be a long argument.
22 I'm happy to start it now, but if you are looking at the
23 clock, I'm happy to also answer, to give you a little preview.

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1 MJ [COL POHL]: Let me ask you a question and then we will
2 come back to it ----

3 LDC [MR. CONNELL]: Yes.

4 MJ [COL POHL]: ---- because we actually got stuff done
5 today. This is an issue that comes up again with the Senate
6 documents. Are you talking about documents that are owned by
7 the Senate?

8 LDC [MR. CONNELL]: Right.

9 MJ [COL POHL]: Or do we get to the issue of they have
10 already shared them and therefore they don't own them?

11 LDC [MR. CONNELL]: Correct, they've already shared them
12 with the Executive branch. In fact, the first government
13 pleading on this said we are looking at the Department of
14 Defense version of the document. Later they shifted and said
15 we are looking at the Senate's version, which is fine, they
16 can look at whatever version they want.

17 MJ [COL POHL]: Let me just start with just a basic, you
18 know, the scope of my authority or lack thereof.

19 LDC [MR. CONNELL]: Sure.

20 MJ [COL POHL]: Do I have authority to order the Senate to
21 produce these documents?

22 LDC [MR. CONNELL]: As you have told me many times, you
23 don't have authority to order anyone to do anything. The only

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1 thing that you can do is order ----

2 MJ [COL POHL]: No, I understand.

3 LDC [MR. CONNELL]: ---- that either the United States
4 Government acts or you abate.

5 MJ [COL POHL]: Absolutely. Absolutely, because the
6 ultimate hammer is produce or abate.

7 LDC [MR. CONNELL]: That's all you got.

8 MJ [COL POHL]: That's the way it is, but ----

9 LDC [MR. CONNELL]: But if your question is ----

10 MJ [COL POHL]: It's one thing to tell me -- the Convening
11 Authority to produce or abate when the Convening Authority has
12 the authority to do this. My question is does ----

13 LDC [MR. CONNELL]: The Convening Authority doesn't have
14 authority over the CIA or the NSA or the Department of Labor
15 or anybody else.

16 MJ [COL POHL]: We're digressing here.

17 LDC [MR. CONNELL]: No, I think I am actually trying to
18 answer the question, which is it somehow different because it
19 is the Legislative branch instead of the Executive branch.

20 MJ [COL POHL]: That's the question.

21 LDC [MR. CONNELL]: And the answer is no, because let's
22 say you were trying to produce a presentence report from a
23 witness, right? The witness gets up and testifies, they have

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1 a criminal record, they are a cooperator, the defense wants
2 their presentence report. That's a judicial document. So
3 somebody can order that produced. Executive, legislative,
4 judicial makes no difference in your authority to produce.

5 MJ [COL POHL]: Okay. Let's talk about one of your
6 favorite areas that I hear of all the time that I know I'm
7 not, is an Article III federal court.

8 LDC [MR. CONNELL]: I know you always try to pin me with
9 that. It is Mr. Kammen that tries to talk about the
10 Article III courts.

11 MJ [COL POHL]: Maybe it is Mr. Kammen, but I know you all
12 think it. Do you have any authority where an Article III
13 court ordered the Legislative branch to produce legislative
14 work product in a noncriminal situation? When I say
15 "noncriminal," not that it's not a criminal trial, but that it
16 doesn't involve criminal conduct by the Legislative branch
17 itself? Do you understand, I am not talking about times where
18 they took a bribe or things like that because I think there is
19 a difference there, but I am saying -- do you understand what
20 my question is?

21 LDC [MR. CONNELL]: Yes, and why don't I take that as a
22 homework assignment.

23 MJ [COL POHL]: Okay. Good. Okay. Do your homework.

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1 Okay.

2 LDC [MR. CONNELL]: Thank you. Thank you, sir.

3 MJ [COL POHL]: We will pick up --

4 ADC [MS. LACHELIER]: One question, if I can come up for a
5 second.

6 Sorry, if I may for a second circle back to 252. I
7 just wanted to clarify on 112 whether you were going to look
8 in camera at all of the OLC memos or just a sampling from the
9 government. It wasn't clear to me earlier. You had mentioned
10 that you asked the government to show you redacted versions,
11 what was produced, and you were going to look at it.

12 MJ [COL POHL]: Well, we will see what I need to see. I
13 mean, we are going to talk about this tomorrow in the
14 classified session.

15 ADC [MS. LACHELIER]: Okay.

16 MJ [COL POHL]: Hold that thought.

17 ADC [MS. LACHELIER]: Our request would be that you look
18 at all three of the OLC memos, that the government not provide
19 a fraction of them.

20 MJ [COL POHL]: If that's needed, that's fine.

21 Just for the way ahead, as I stated yesterday,
22 tomorrow we will have a closed session under 505(h) to discuss
23 classified material and the use thereof. I intend to address

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1 the 505(g) notices, as a minimum, for 396, 397, 254 and
2 perhaps, if we get to it, 018. I really don't think we would
3 get to more than that.

4 LDC [MR. RUIZ]: Could you repeat that one more time,
5 please, Judge?

6 MJ [COL POHL]: Sure. 396, 397, 254 and 018.

7 LDC [MR. NEVIN]: And you're only talking about the
8 classified information parts of this, not ----

9 MJ [COL POHL]: I am talking about the way ahead for the
10 other stuff. That's tomorrow's issue. And, again, given the
11 breadth of 397 and all its subsets, I'm not sure we will get
12 through all of that in there. I really want to get to,
13 though, because it has been one of my lingering motions, is
14 the 254 classified portion of that. Okay. So that's to just
15 kind of give people the way ahead and so the court reporters
16 will know what I need tomorrow.

17 LDC [MR. RUIZ]: Judge, on your comment on 254 and I know
18 you've -- and I agree it has been around for quite a while --
19 we are still awaiting a ruling from you on our discovery
20 motion from last hearing and I just want to make sure that
21 that hadn't ----

22 MJ [COL POHL]: No.

23 LDC [MR. RUIZ]: It's in the mail?

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1 MJ [COL POHL]: No, it's not in the mail yet. When I say
2 "it's not in the mail," I don't think it's in the mail because
3 my way ahead next week is going to be 400. We will probably
4 pick up 254 right after 400, motion for reconsideration, and
5 254 discovery. Okay? This is the logical way of doing it.
6 Then after that we will come back to 397. If there is a need
7 for a closed session under 806, right now my tentative plan
8 will be next Friday, a week from tomorrow. All subject to
9 change, as we all know things can, but that's to kind of just
10 give you guys a way ahead. If we get to it, 254, 397 are
11 resolved or fully argued, then the next on the list will be
12 018. Excuse me, 152, if you want to be heard on that,
13 Mr. Harrington.

14 LDC [MR. HARRINGTON]: Yes, Judge. Mr. Trivett and I have
15 been discussing the possibility. I think we will have a
16 proposal for the court, maybe tomorrow.

17 MJ [COL POHL]: Okay. Again, I don't want to minimize
18 that one. It's shorter, but once we get to 018, that strikes
19 me as another one of those things that it has got four
20 different parts to it, so...

21 LDC [MR. NEVIN]: So that would be after 152?

22 MJ [COL POHL]: Yes.

23 LDC [MR. NEVIN]: Okay.

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1 MJ [COL POHL]: And, again, we may have to break that up
2 with -- start in open session this hearing and then combine
3 open and closed sessions next hearing.

4 LDC [MR. CONNELL]: Sir, while you are talking about
5 scheduling, at the 802 you mentioned 365 which is important to
6 break a logjam on 373 ----

7 MJ [COL POHL]: If I can get to it, Mr. Connell.

8 LDC [MR. CONNELL]: All right. Thank you.

9 MJ [COL POHL]: There is a lot of logjams here. I can
10 only dynamite so many at a time.

11 LDC [MR. CONNELL]: Okay.

12 MJ [COL POHL]: So tomorrow it will be 0900 for the 505(h)
13 hearing. Just so we are all on notice, I -- sometimes we do
14 these hearings and I don't really know what the specific
15 classified information that you want, so let's have the
16 specificity so we can move through that. Then we will issue
17 whether or not there is a need for a closed session under 806.
18 If there isn't, obviously Friday will stay as an open session.

19 LDC [MR. NEVIN]: Could I ask, we have some business to do
20 here in the courtroom that we have coordinated with the guard
21 force and the OSS that we need about an hour with Mr. Mohammad
22 here and it involves taking a photograph, one or more
23 photographs, and ----

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1 MJ [COL POHL]: You already discussed it with the guard
2 force?

3 LDC [MR. NEVIN]: The taking of the -- yes, the
4 arrangements for taking the photograph have been discussed but
5 we just need the time.

6 MJ [COL POHL]: Normally I'm sensitive to the fact --
7 well, I am. I am sensitive to your needs but also the fact
8 that these guys and gals have been up since zero dark
9 thirty -- excuse me, they have been up very early. I didn't
10 mean to say that.

11 LDC [MR. NEVIN]: A long time.

12 MJ [COL POHL]: Didn't mean to say that. They have been
13 up early, but tomorrow they get to sleep in, most of them,
14 because there will be no detainees here. Cutoff today is
15 1800.

16 LDC [MR. NEVIN]: Thank you, Your Honor.

17 MJ [COL POHL]: Commission is in recess.

18 [The R.M.C. 803 session recessed at 1648, 18 February 2016.]

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